the natural termination of the preceding freehold, however, persisted until in 1877 Parliament provided against this result "in the event of the particular estate determining before the contingent remainder vests." [17] While contingent remainders expressed to individuals are undoubtedly adequately covered, the act has been criticized as not thoroughly embracing those expressed to classes.[18] The wording of the proposed Massachusetts law avoids this difficulty. Thus, where property is devised to A. for life, remainder to such of his children who attain twenty-one, and A. dies leaving six children, only two of whom are of age, under the English act the two will take to the exclusion of the others;[19] but under the suggested Massachusetts enactment all may eventually take as the testator intended.

The proposed statute further establishes that contingent remainders shall be subject to no other rule concerning remoteness save the rule against perpetuities. This renders impossible in Massachusetts the confusion and indefiniteness ensuing from adopting a further rule forbidding a limitation to an unborn person for life with remainder to the issue of that person.[20] While this provision may be merely declaratory of existing legal principles in that state,[21] it nevertheless is desirable that the law on this point be properly and definitively settled, at the same time avoiding both uncertainty while awaiting judicial decision, and the attendant, and not altogether negligible, risk that the technical English rule might be accepted.

The bill which is to be submitted to the Massachusetts legislature is accordingly worthy of unreserved support. When rules, which are at best but arbitrary and technical historical survivals, not only serve no useful purpose, but by their very existence jeopardize the successful disposition of property, the time for their abolition has come. Their existence until this late day is attributable solely to inertia.[22]

APPLICATION OF THE RULE IN CLAYTON'S CASE TO THE DISTRIBUTION OF PROPERTY HELD UNDER CONSTRUCTIVE AND RESULTING TRUSTS. — It is refreshing to find a recent English case which declines to apply

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[17] LAW ON CONTINGENT REMAINDERS, STAT. 40 & 41 VICT., c. 33.

[18] WILLIAMS, SEISIN OF THE FREEHOLD, 205.

[19] For operation of the rule prior to the statute see Breckenbury *v.* Gibbons, L. R. 2 Ch. Div. 417; Symes *v.* Symes, [1896] 1 Ch. 272.

[20] Whitby *v.* Mitchell, 42 Ch. Div. 494, 44 Ch. Div. 85; extended to equitable estates in *In re* Nash, [1901] 1 Ch. 1; and unsoundly followed in *In re* Park's Settlement, [1914] 1 Ch. 595, which was criticized in 27 HARV. L. REV. 752 and 30 L. QUART. REV. 134, 353. See WILLIAMS, LAW OF REAL PROPERTY, 22 Eng. ed., 420, 17 Int. ed., 470.

[21] There has been no Massachusetts adjudication. But see GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 284 *et seq.*; also 16 HARV. L. REV. 294.

[22] For American statutory changes up to 1886 see STIMSON, AMERICAN STATUTE LAW, § 1426. See ALA. CODE (1907), § 3398; ARIZ. CIVIL CODE (1913), § 4692; GA. CODE (1911), § 3675; KY. STATUTES (1909), § 2346; HOWELL'S MICH. STATUTES (1913), §§ 10654–6; MINN. GENERAL STATUTES (1913), § 6684; N. Y. CONSOLIDATED LAWS (1909), ch. 52, § 58; N. DAK. REVISED CODE (1905), § 4778; S. DAK. COMPILED LAWS (1913), § 258; VA. ANNOTATED CODE (1904), § 2424; W. VA. CODE (1906), § 3031; WIS. STATUTES (1911), § 2058.

the rule in *Clayton's Case*[1] as a blind mechanical rule of thumb with a stern disregard of the justice of any particular result. *In re British Red Cross Balkan Fund*, [1914] 2 Ch. 419.[2] According to this rule, where there is a running account between two parties, and the debtor makes a payment thereon, if neither he nor the creditor at the time of payment specifies what debt it is applied to, the payment is presumed to be in satisfaction of the debts which earliest accrued.[3] Like other rules of presumption,[4] it is a highly specialized tool in the judicial workshop, admirably fitted to one peculiar angle of our law, but likely to botch the job when used in another situation.

Legitimately applied, the rule fairly determines the relations of the parties *inter se* in accordance with accounting methods and business custom. Thus, suppose a depositor puts $100 into a bank, later adds another $100, and then draws out $100. In a contest between bank and depositor, turning upon the question which deposit had been withdrawn, the rule in *Clayton's Case* applies, and the presumption is that it was the first deposit. Feeling constrained by this analogy, the courts formerly held that if a trustee deposits $100 belonging to his *cestui*, later adds $100 of his own, and then withdraws $100, which is dissipated, the *cestui* had no rights against the fund remaining on deposit.[5] But now the *cestui* is given a right against the balance, which right is generally based on the fiction that the wrongdoer is presumed to withdraw his own money first.[6]

The courts have not yet discarded the rule as a measure of the *cestuis'* rights, in a case where the trustee commingles the money of two *cestuis* in one bank account, without adding any of his own. Thus, if a trustee for A. and B. deposits $100 of A.'s, later adds $100 of B.'s, and then withdraws $100, which he dissipates, B. may claim the entire balance.[7] The courts cannot extricate themselves from this position by any fictitious presumption of the trustee's intent in making the withdrawal, as was done where the trustee's own money was mingled with the *cestui's*. But an equity for the *cestuis* in both cases may be worked out on scientific principles without resort to a fiction. Two rights are open to the *cestui*.[8] First, he may claim an equitable lien upon the trustee's entire *chose in action* against the bank for the amount of the trust funds wrongfully deposited. Secondly, the injured *cestui* may claim that the depositor is holding in constructive trust a part of his *chose in action* against the bank pro-

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[1] 1 Mer. 572, 608.

[2] A statement of the case appears in RECENT CASES, p. 216.

[3] For a general discussion showing the place which the rule in Clayton's Case occupies in the law of appropriation of payment, see 21 HARV. L. REV. 623; 3 AM. LAW REG. 705; 1 AM. LAW MAG. 31; 1 AM. LEAD. CAS. 339.

[4] *Cf.* the comment of Maule, J., on the presumption that every person knows the law, in Martindale *v.* Falkner, 2 C. B. 706, 719.

[5] Pennell *v.* Deffell, 4 DeG., M. & G. 372; Brown *v.* Adams, L. R. 4 Ch. 764.

[6] Knatchbull *v.* Hallett, 13 Ch. D. 696, 726; *In re* A. O. Brown & Co., 189 Fed. 432.

[7] *In re* Stenning, [1895] 2 Ch. 433; Empire State Surety Co. *v.* Carroll County, 194 Fed. 593.

[8] For a fuller development of these theories, citing authorities, see an article by Prof. Austin W. Scott, entitled "Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125.

portionate to the *cestui's* contribution to the entire deposit. Where a *cestui* whose money has been mingled with the trustee's pursues one of these remedies, the trustee should not be allowed to set up *Clayton's Case* in defense. Even an *actual* intent to destroy the remedies by making withdrawals should be ineffective; [9] and clearly the law should not manufacture a presumed intent more potent than the actual intent of a wrongdoer. If only the *cestuis'* money has been commingled, without the addition of any money of the trustee's, the *cestuis* are, in substance, on either the lien or constructive trust theory, co-owners of the claim against the bank. Increases in value are divided equally between them,[10] and similarly wrongful withdrawals should be charged against them equally.

In the recent English case referred to, the money of many subscribers to a fund was mingled, and withdrawals were made by the trustee in legitimate pursuance of the trust. When, the purpose of the express trust failing, it became necessary to determine the beneficiaries of the resulting trust,[11] the court directed a distribution *pro rata* among all the subscribers, instead of paying the last contributors in full. Thus the courts say, where the trustee's withdrawal from commingled trust funds is wrongful, *Clayton's Case* is applied; where the withdrawal is authorized, *Clayton's Case* is not applied. Two situations of interest were not before the court in this case. Suppose the money of one subscriber was expended before any other subscriptions were mingled with it. It is submitted that he would have no claim to a share in the unexpended balance. His right is defeated, not by the operation of the rule in *Clayton's Case*, but by the fact that his money could actually be identified as that which was withdrawn. Secondly, suppose the money of any subscriber is accepted after the purpose of the trust has failed. From the moment the money is received, it is subject to a resulting trust in favor of the subscriber. It is submitted that his interest as a beneficiary to the full extent of his contribution should not be diminished by the mingling of his money with the other funds.

For the subscribers who stand between these two extremes the principal case establishes an equitable rule. They have an inchoate right by way of resulting trust to all that remains if the express trust fails. This remotely contingent interest should be regarded as ownership in common, and hence a decrease in the value of the whole should be distributed *pro rata* among them.[12] To apply the rule in *Clayton's Case* would seem wholly unjustifiable. As there is no rational distinction between this case and the situation where the trustee's withdrawal is wrongful, it may not be over sanguine to hope that the rule in *Clayton's Case* will no longer be erroneously applied in the latter situation.

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[9] Subject, of course, to the nature of the right. Thus the lien remedy can never be worth more than the total amount on deposit.

[10] Lord Provost *v.* Lord Advocate, 4 App. Cas. 823.

[11] *In re* Trusts of Abbott Fund, [1900] 2 Ch. 326; Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17.

[12] *Cf. In re* Printers' Trade Protection Society, [1899] 2 Ch. 184; and *In re* Trusts of Abbott Fund, *supra*.